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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057023
Party	Plaintiff LuckyU Enterprises, Inc., dba Giovanni's Original White Shrimp Truck
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Trial and Appeal Board

Cancellation No. 92057023

Registration Nos: 4,220,686 - GIOVANNI'S ALOHA FOODS
 4,224,400 - GIOVANNI'S SCAMPI MARINADE
 4,232,469 - GIOVANNI'S ORIGINAL WHITE SHRIMP TRUCK
 4,248,595 - GIOVANNI'S HOT & SPICY WE REALLY MEAN IT! SAUCE

LuckyU Enterprises, Inc.)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92057023
)	
John Aragona)	
)	
Registrant)	

PETITIONER'S REPLY BRIEF

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I. Introduction¹

Petitioner respectfully requests the Board cancel the four Registrant's GIOVANNI'S marks at issue because there is strong evidence of a likelihood of confusion between Petitioner's GIOVANNI'S marks and Registrant's GIOVANNI'S marks. Further, Registrant has abandoned any claim to the trademarks, falsely suggests a connection with Petitioner, is deceptive, and the registrations were procured by fraud. Registrant focuses his brief on his perceived priority of use and an imaginary license agreement while failing to address the majority of Petitioner's Trial Brief. Registrant has failed to proffer any evidence of his own current use of any trademark necessitating cancellation of Registrant's GIOVANNI'S marks. Registrant's reliance on Petitioner's use is misguided, contrary to the agreements between the parties and contrary to well established law.

Registrant confuses the issues before the Board and asks the Board to overlook nearly ten years of his absence from any food service business and instead transform an Asset Purchase Agreement ("APA") into a license agreement. Registrant makes this argument in his capacity as an individual. However, the tradename relied upon was a company asset, not an asset owned by him as an individual. Registrant has not proven that he is the source of the goodwill and quality of the trademarks, and that customers recognize him as the source, and thus, there is nothing to license. These facts are fatal to his "license" claim. Further, the APA was not a license. The four corners of the APA compel this conclusion. Still further, it is Registrant's own introduction of an unexecuted amendment to the APA that confirms the stark contrast between the existing purchase agreement between the parties versus Registrant's purported trademark license. There is no evidence that this unexecuted document was signed by anyone, and further there is no

¹ Petitioner's Objections to Registrant's Evidence are found at Appendix A.

evidence it was even presented to Petitioner's predecessor Nitsche Enterprises. Because Registrant's "license" argument is insufficient and Registrant has not provided evidence refuting the claims made in Petitioner's Trial Brief, Registrant's marks must be cancelled.

The Aragonas sold their shrimp truck business to Troy Nitsche in order to fund their bottling sauce business. When the bottling sauce business began to fail, Troy Nitsche invested in the bottling sauce business to the supposed mutual benefit of all parties. Shortly thereafter, Registrant fled Hawaii and thereafter took no part in running the bottling sauce business. Petitioner was forced to assume control of the bottling sauce business, and the business continued to run for years after Registrant left Hawaii. During that time, Petitioner's shrimp truck business continued to grow through the advertising and quality efforts of Petitioner. It was only many years after Petitioner's popularity and value had grown that Registrant has now tried to step in and claim rights well exceeding any agreement between the parties.

II. Background Reply

Registrant spends a significant portion of his brief describing his use of the mark before the sale of the shrimp truck business to Troy Nitsche. See Registrant's Brief at 7, 9-11, 29-31. However, Petitioner has always conceded that Registrant and his then wife, Connie ("the Aragonas"), first started using the GIOVANNI'S name when selling prepared shrimp from a truck. However, despite his contentions, Registrant has not proffered evidence *he* was the sole owner of any trademark. In fact, there is plenty of evidence his then-wife Connie made all of the sauce used with the shrimp. PNOR Exhibit 7, Aragona DD 62:1-8 ("I was mostly the sales end...I bet I put in a 12-hour day on average, maybe longer in some cases, come back and help Connie make sauces and stuff at night"). Further, Registrant himself constantly and consistently used the term "we" when referencing the shrimp truck business before the sale to Troy Nitsche.

See e.g., PNOR Exhibit 7, Aragona DD 35:9-36:18 (“We did the stencils...We got the stencils and we painted it up. I built and made that sign”). Registrant admits he never set up or ran a sole proprietorship, but was rather part of a partnership with his wife. PNOR Exhibit 7, Aragona DD 36:3-18. This was confirmed by his then-attorney. See Sonson TD at 43:25-44:4 (“[The Aragonas’] were operating the business together”). There is no support for Registrant’s position that *he* owned the trademark separate from the business he ran with his wife. Accordingly, the business entity owned all assets of the company, and there is no evidence that he as an individual has any claim to any assets including any tradenames or trademarks.

A. The Shrimp Truck Business was Sold to Troy Nitsche

Further evidence the Aragonas jointly owned the shrimp truck business is evidenced by the signatures on the APA. Nitsche TD1 38:6-39-7 and Exhibit 8, Appendix A.² Troy Nitsche purchased the shrimp truck business from the Aragona partnership and there is no evidence or testimony from anyone to the contrary, other than self-serving testimony by Registrant that he alone controlled use of the “trademark.”

The APA provided for the sale of all of the assets of the shrimp truck business, including the signs and the trucks that included “GIOVANNI’S.” Nitsche TD1 at Exhibit 8, Appendix A. However, the APA specifically excluded from the asset transfer, the sauce recipes. The exception was conditioned on a requirements provision in which Petitioner would purchase sauce from the Aragonas, as long as the sauce could be provided and as long as other conditions were met by Petitioner. Id. If the sauce could not be provided by the Aragonas, the Aragonas were required to provide the sauce recipes to Petitioner. Id. The APA also specified joint ownership in a

² Registrant’s own attorney testified as much. See Sonson TD at 43:25-44:4 (“Q. Why did both John and Connie Aragona sign the asset purchase agreement? A. They were identified as the sellers. They were operating the business together, and that’s why they needed to sign”).

tradename “Giovanni’s Aloha Shrimp.” Id. Absent from the APA were terms that would indicate a license, such as an express remedy if Petitioner failed to supply the specific number of shrimp or a license royalty or term. Nothing in the APA indicates an ongoing license agreement.

The facts indicate the Aragonas quickly failed to meet Petitioner’s demand for sauces and pursuant to the APA, the Aragonas relinquished the recipes for the sauces. Nitsche TD1 at 45:14-25. The only other interaction with the shrimp truck business by either Connie or Registrant was in their capacities as individuals, and Connie Aragona’s interaction was an attempt to “recover” the business, and she is still in the midst of serving a twenty year criminal sentence for her part in the “recovery” attempt. Nitsche TD1 at 50:11-21.

B. Registrant Abandoned the Sauce Bottling Business

Contrary to Registrant’s contention, there is no evidence that he licensed, orally or otherwise, the use of GIOVANNI’S to Giovanni’s Aloha Foods, a Hawaii LLC (“the Hawaii LLC”). In fact, Registrant provided no evidence of the operations of the Hawaii LLC before Troy Nitsche’s involvement with the business in 1999. The Limited Liability Member Agreement speaks for itself. Nitsche TD1 at 46:23-10 and Exhibit 9. In exchange for contributing their sauce recipes and certain other assets, the Aragonas would run the day-to-day operations of the business. Nitsche TD1 at Exhibit 9. The five members had three separate voting rights and the Aragonas, together, had only one of the votes. Id. There are certain provisions described in the agreement that refer to the Aragonas retained rights, as noted by Registrant, but there is nothing referencing a trademark license. Id. Further, Registrant glosses over the fact that shortly after executing the operating agreement, he disappeared and did not exercise ANY control over the LLC for the four years it operated after Registrant left Hawaii. Nitsche TD1 at 49:25-50:10. There is no evidence that Registrant left Hawaii to focus his efforts on opening a shrimp truck in

New York, as Registrant now contends. See Registrant's Brief at 17. The LLC was dissolved in 2004 and all the assets were transferred to Petitioner as part of that dissolution. Nitsche TD1 at 53:3-10.

C. Registrant's Improper Attempt to Connect a Lease Agreement and an Unexecuted "Amendment to the APA"

Registrant has proffered an unexecuted document titled Amendment to the APA ("Unexecuted Document") to support his position Petitioner was a licensee. This document was never executed and Petitioner had no knowledge this document existed until the instant proceeding commenced. Nitsche TD2 14:21-15:2. To the extent Registrant is asserting the Unexecuted Document is evidence of a license agreement, it should be stricken. Registrant has failed to provide an executed copy of the Unexecuted Document and there is no evidence of its execution. This is unsurprising considering Petitioner never signed this document, nor even had knowledge of its existence in 1997.

Registrant also attempts to tie in a subsequent Lease Agreement to suggest that the Unexecuted Document must have been executed. See Registrant's Brief at 14-16. The attempt to include the Unexecuted Document is purposefully deceptive. The provisions of the APA specify an executed Lease Agreement. Nitsche TD1 at Exhibit 8, Appendix A ("it shall be the sole responsibility of the Seller to obtain the consents of both landlords prior to closing"). The APA agreement would not have been effected but for the Lease Agreement. *Id.* Further, neither the Lease Agreement nor the APA ever references the Unexecuted Document and thus provide no indication about the intention of the parties under the Hawaiian Statute of Frauds.

The real estate Lease Agreement was titled "License Agreement," a misnomer in the context of this proceeding. The agreement is quite clearly a real estate lease agreement between Petitioner and the land owner of the Kahuka shrimp truck location and does not directly concern

Registrant. Aragona TD at 20:5-21-10 and Exhibit 5. None of the term provisions of the lease, summarized by Registrant at Registrant's Brief pages 14 and 15, relate to a relationship between Petitioner and Registrant. For example, Registrant argues the lease agreement gives **him** the right to inspect Petitioner's premises, yet those are rights of the land owner. See Registrant's Brief at 19. While Registrant co-signed the agreement as per the terms of the APA, the license agreement does not provide any express or implied rights to Registrant. See Aragona TD at Exhibit 5, ¶ 17 (the rights of inspection are given to the land owner, not Registrant).³ The only effect of the license agreement is to set out the monthly rent and annual increases agreed to by Petitioner, and to ensure that Petitioner is the named party on the lease, with the ability to lease the land as specifically provided for in the APA, executed a month earlier. Compare Nitsche TD1 at Exhibit 8, Appendix A, ¶ 3, and Aragona TD at Exhibit 5 ¶ 3.

The Lease Agreement was necessary to close the APA because the leased land parcel was the location for the food-selling operations and assets being purchased. However, Registrant posits that the Lease Agreement indicates the execution of the Unexecuted Document. Registrant's Reply Brief at 15. Yet no executed copy of this document has been produced. No person has testified as to the execution of the document, not even Registrant. Registrant's former attorney testified that he was unable to find Registrant's files, but he was able to find an unexecuted copy of the document. Sonson TD at 26:17-20. Registrant's attorney has no recollection of what happened after the document was drafted. Sonson TD at 27:24-28:1 ("After this document was given to John, I have no recollection as to whether or not they had any problems after that...Q....So do you know, did the parties sign the agreement? A. I can't recall

³ Petitioner no longer leases the land from Kahuka Village Associate, Inc. and Petitioner owns all the land for its food truck operations. See Nitsche TD1 11:23 ("We own the land now on which the truck sits").

how this agreement was signed. I did have follow-up conversations with John, and everything seems to have been fine, so the deal went through, and everything's done, so I'm just assuming everything was fine. He disappeared after that."'). There is no evidence that provides any indication of a legally operable status for the Unexecuted Document and it should be stricken as purported evidence of a license agreement.

III. Reply to Registrant's Argument

A. Priority in a Trademark is Not Maintained solely Because of First Use

Registrant spends a significant portion of his brief extolling on the origins of the GIOVANNI'S trademark and his own supposed plans to further a business using various trademarks for the purpose of establishing his priority in the trademarks. See Registrant's Brief at 7-11 and 29-31 ("Q: Okay, and did you receive permission to do so from Mr. Aragona? Objection, form. A: I think that's what the asset purchase agreement was, that's what it was for, you know? I didn't give him \$120,000 because, you know, I like him"). It is well-understood that trademark ownership is not merely established because a person created a name or even first started using a name with specific goods and services. A trademark must be used in conjunction with an existing business to establish ownership. *Pike v. Ruby Foo's Den, Inc.*, 116 F.Supp.336 (D. D.C. 1953) ("A trade-mark or trade name is merely protection for the good will of a business, and is not the subject of property except in connection with an existing business"). Because trademark ownership is only given protection based on use, certain ownership principles have been established to allow for the transfer of trademark ownership and Registrant's argument is contrary to these basic principles. These ownership principles include sale and/or assignment of a trademark, control over use of a trademark, and trademark license. Based on these principles, it is clear Registrant does not have priority in use of the GIOVANNI'S mark.

1. Sale and/or Assignment of a Trademark

According to Registrant, solely because he started using the name GIOVANNI'S in connection with the sale of shrimp, he can retain the trademark rights so long as someone else continues using the mark. Registrant labels this concept under the theory of "an implied license." See e.g., Registrant's Brief at 21-23 citing to portions of Petitioner's Testimony and arguing this is somehow evidence of an "implied license," when it is clearly evidencing a sale. The idea that the original user of the mark owns it in perpetuity defeats the concept that trademarks can be bought and sold. See MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:1. This is especially true when, as here, all of the tangible assets were purchased, including signs and other indicators of the trademark, and Petitioner continued to operate the shrimp trucks after the purchase. *Id.* at § 18:23; see Nitsche TD1 at Exhibit 8, Appendix A.⁴ A personal name trademark can also be sold or assigned. See MCCARTHY § 18:32; *Richmond Nervine Co. v. Richmond*, 159 U.S. 293 (1895).⁵ Even if Registrant was first to use the mark, that fact alone is not sufficient to perfect his continued ownership in a trademark. Petitioner's Trial Brief includes ample evidence of Petitioner's efforts to acquire, use and expand the GIOVANNI'S brand since the acquisition of the shrimp truck business and this establishes Petitioner's ownership in the trademarks. Petitioner's Trial Brief at 11-14.

⁴ A company succeeds in the right, title and interest in trademarks used in a business that it succeeds. *Hi Lo Mfg. Corp. v. Winegard Co.*, 167 USPQ 295, 296 (TTAB 1970).

⁵ There is no evidence in the record that any consumer associated the term "GIOVANNI" with Registrant. However, Registrant cites to certain cases that purport to stand for the proposition a personal name cannot be transferred without an express transfer. Registrant's Brief at 23-24. These cases do not relate to transfer of a trademark utilizing a common first name like "GIOVANNI" and they all relate to transfers in bankruptcy and not express transfers such as the APA "joint ownership" transfer. See *Sarrazin v. W. R. Irby Cigar & Tobacco Co.*, 93 F. 624 (5th Cir. 1899) (the mark at issue was "King Bee"); *Children's Bootery v. Sutker*, 91 Fla. 60, 70 (Florida 1926) ("But the trade name now under consideration is not a personal one..."); *Robinson v. Spikes*, 53 Tenn. App. 616 (Tenn. Ct. of App 1964) (the mark at issue as a surname "SPIKE").

2. Control Over Use of a Trademark

Registrant also argues that he individually owned the GIOVANNI'S mark and he orally licensed the use of the trademark to other entities, including the Hawaii LLC. There is no evidence to support this argument. Because a trademark is merely protection for the goodwill of a business, an individual can only "own" a trademark used by a related company if the individual controls use of the trademark. *See Pneutek, Inc. v. Scherr*, 211 USPQ 824, 830 (TTAB 1981).⁶ There is no evidence that Registrant, alone, ever controlled use of the trademark and thus ownership in the trademarks existed only with the businesses that used the trademarks.

a. Control over use of the mark with the Shrimp Truck

The only evidence of control over the use of the trademark with the shrimp truck, prior to the sale to Petitioner, is the joint signature by both Aragonas on the Asset Purchase Agreement. Nitsche TD1 38:22-39:2 and Exhibit 8, Appendix A. Registrant has not produced any evidence that he alone controlled use of the trademark with the shrimp truck. Similarly, after the sale to Petitioner, there is no evidence provided by Registrant, nor does any exist, that Registrant ever controlled use of the GIOVANNI'S trademark in association with Petitioner's shrimp truck business. Registrant has not provided any evidence that would indicate he solely controlled the use of the GIOVANNI'S mark with the shrimp truck business and thus there is no evidence he owned the mark as an individual.

⁶ This concept of "control" by an individual is related to Trademark Manual of Examining Procedure § 1201.03(b), wholly owned related companies. McCarthy notes that "[i]t is presumed...that a real person who owns *all* the stock of a corporation controls the corporation so that use of the mark by the corporation inures to the benefit of the real person, who is presumed to be the 'owner' of the mark." MCCARTHY § 16:36; *see also In re Hand*, 231 USPQ 487 (TTAB 1986).

b. Control over use of the mark with Giovanni's Aloha Foods, a Hawaii LLC

On the other hand, there is ample evidence that proves Registrant did not control use of the GIOVANNI'S mark used by Giovanni's Aloha Foods, a Hawaii LLC. For example, the LLC Member Agreement provides that the Aragonas, both Connie and John, together owned 50% of the LLC. Nitsche TD1 46:23-47:9 and Exhibit 9. The Agreement also indicates that the Aragonas together had only one voting interest out of three total voting interests. *Id.* The LLC Agreement also indicated that *both* John and Connie were responsible for the day-to-day management and decisions of the LLC, not Registrant alone, as he indicates in his Brief. *Id.*; see Registrant's Brief at 16 ("In the operating agreement that was signed in connection with Petitioner's investment, Respondent ensured that he retained ultimate control over the day-to-day management and decision making of the company, and therefore the Marks"). Further, it is uncontroverted that Registrant abandoned the Hawaii LLC in 2000 and never returned to operate, manage or control use of the trademark. Registrant never controlled or, at a minimum, Registrant's actions show that he abdicated the alleged control over the use of the GIOVANNI'S marks by the Hawaii LLC and therefore cannot own the trademarks. See Petitioner's Trial Brief at 23-23 discussing how Registrant is not related to Petitioner. *Compare Pneutek*, 211 USPQ at 833 (finding control sufficient when individual owner was the President of the related company, devoted about 80% of his time to its activities, reviewed all correspondence related to the company, and his name appeared in each of the issues of the publication); *In re John A. Briggs*, 229 USPQ 76, 77 (TTAB 1986) (finding ownership in an individual when Applicant directed and oversaw the activities of a corporation on a day-to-day basis).

3. Trademark license

Registrant has failed to proffer any evidence of sufficient control over the use of any GIOVANNI'S mark to maintain control over a licensee. A trademark licensor can maintain ownership in a trademark through use by a licensee only so long as licensor owner maintains the standards of quality of goods and services sold under the mark. See MCCARTHY §§ 3:10 and 18:42. This is true under an express or implied license. See *Pneutek*, 211 USPQ at 833 (“A formal agreement is not a necessity, nor is its mere existence sufficient”) (quoting *Dawn Donut Company v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367, 121 USPQ 430, 437 (2nd Cir. 1959). Instead, “the critical question is whether the [registrant] sufficiently policed and inspected its licensees operations to guarantee the quality of the products sold under its trademarks to the public.” *Id.* (quoting *Dawn Donut* 121 USPQ at 437). Thus a trademark licensor has a duty to control the quality of a product or service sold under a trademark. See *Kentucky Frid Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977) (“Courts have long imposed upon trademark licensors a duty to oversee the quality of licensees’ products”). Quality control means more than passively ensuring a product is “good.” See *Barcamerica Int’l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 597-98 (9th Cir. 2002). The test is whether the purported licensor “played any meaningful role in holding [a product] to a standard of quality – good, bad or otherwise.” *Id.* at 598. If a licensor fails to exercise control over the licensee, the licensor abandons the trademark. *Id.*

Registrant has not exercised any meaningful control over the use of Petitioner’s marks. To support his theory on his “actual control,” Registrant argues he supplied the sauce used by Petitioner, he competently monitored the quality of Petitioner’s operation, and he reasonably

relied on his “close” relationship with Petitioner. Registrant has failed to proffer any evidence to support this attorney argument and Registrant did not control use of the GIOVANNI’S mark.

a. Petitioner controls the use of the mark with the shrimp trucks

Registrant has not proffered any evidence that he actually supplied sauce to Petitioner or how much sauce he supplied to Petitioner. At best, Registrant’s business only supplied sauce to Petitioner for a very short period after execution of the APA. This does not amount to meaningful control over quality. Troy Nitsche testified that from the very beginning he had to make his own sauce. Nitsche TD1 at 45:14-25. Moreover, Petitioner long ago ceased use of the original sauce recipe and he has changed the shrimp truck menu. Nitsche TD1 at 50:13-52:10. Petitioner has also changed the signs, the trucks, and the use of GIOVANNI’S. Nitsche TD1 at 52: 21-23. Registrant has never complained of the change in sauce recipes, menu items, signs or trucks. Nitsche TD1 at 52:11-53:2. Further, Registrant never inspected the trucks or the food. Nitsche TD1 at 52:15-17. There is no evidence that Registrant supplied “hot sauce and scampi marinade” during the first three to four years after the APA as Registrant contends.

b. Registrant did not “monitor” the use of the mark and he has not had any relationship with Petitioner for over 15 years.

Registrant has not proffered any evidence to support his position he (1) made trips to Hawaii, (2) contacted locals, (3) read newspapers or other sources, or (4) hired a paralegal. See Registrant’s Brief at 20. Even if Registrant had conducted the described “monitoring,” it does not establish he exercised control over the use of the mark in order to ensure the same quality of the shrimp truck.⁷

⁷ The only shrimp truck operating under the GIOVANNI’S mark is Petitioners and this has been true since Petitioner’s purchase of the shrimp truck in 1997. To the extent Registrant contends

Similarly, Respondent has not proffered any evidence of his “close relationship” with Petitioner. See Registrant’s Brief at 21. Petitioner admits he knows Registrant and that they were partners in a bottling sauce company before Registrant’s disappearance in 2000. Petitioner has not had contact with Registrant since that time. Nitsche TD1 at 55:9-14 (“Q: When was the first time John Aragona contacted you after he disappeared around 2000? A. The first contact I had with John since I saw him walk out the door of the bottling company was to receive a letter from an attorney”). Accordingly, there is no support for Registrant’s alleged monitoring contention that “Petitioner’s performance never faltered or gave Respondent any reason for concern or need to step in and provide assistance.” Registrant’s Brief at 21. While Registrant asserts “[t]here has also been no depreciation of the quality of the food and restaurant services rendered by Petitioner,” Registrant admits the quality of the shrimp truck has increased since Petitioner began operations. See Registrant’s Brief at 21. The standard is not that a licensee exceeds a minimum level of quality, but that the licensor ensures the same standard of quality applies equally among licensees. *See Barcamerica*, 289 F.3d at 598 (finding that the test is whether the purported licensor “played any meaningful role in holding [a product] to a standard of quality – good, bad or otherwise”). Registrant’s own admission that Petitioner provides a higher standard of product indicates a different standard of product from one ever offered by Registrant. Thus Registrant does not control Petitioner’s standard of product.

Registrant has failed to proffer evidence to support his assertion of ownership of the GIOVANNI’S mark. Registrant sold his shrimp truck business and abandoned the bottling sauce business. Petitioner continued on with both businesses after the sale and disappearance of Registrant and the ownership of the marks is with Petitioner. See Petitioner’s Trial Brief at 11-

he has licensed the Marks to “various entities” over the years, Registrant has failed to proffer any evidence indicating any license agreements with any entities. See e.g., Registrant’s Brief at 32.

12. Registrant does not own any GIOVANNI'S mark and therefore does not have priority over Petitioner's use of GIOVANNI'S.

B. The Asset Purchase Agreement was not a license agreement

It is evident Registrant does not own the GIOVANNI'S mark. Instead he relies on an argument that contends that the APA was poorly drafted and as evidence relies on an Unexecuted Amendment to the APA. Somehow, these two propositions support an alleged licensee estoppel argument. However, even if these agreements could be construed as a license, which they cannot, Registrant failed to exercise his duty as a licensor and abandoned the trademark as addressed above.⁸ However, because these agreements do not evidence a licensor/licensee relationship, the licensee estoppel position lacks legal justification.

1. The APA is not an Express License Agreement

Registrant cannot rely on the APA for his proposition that the APA is an express licensing agreement. There are no express license provisions found within the APA. *See McCoy v. Mitsubishi Cutlery, Inc.*, 67 F.3d 917, 920, 36 USPQ2d 1289 (Fed. Cir. 1995) ("In most instances under contract law, a patent or trademark owner intentionally creates an express license"). In fact, the term license is never used in the document. Registrant implicitly acknowledges the Asset Purchase Agreement may not have provided an "express license" and argues that "Minimally, Petitioner's use of the Marks was under an implied license from Respondent." See Registrant's Brief at 17. In support, Registrant argues the lack of express license language was due to "counsel with no experience in the relevant field, and who therefore were simply unaware of the concern." Registrant's Brief at 18; see also Registrant's Brief at 11 ("Sonson has little to no previous experience in trademark law and had never drafted a trademark

⁸ Incredibly, Registrant's Brief even calls Petitioner a "franchisee." Registrant's Brief at 29. There is no evidence of a franchise agreement.

license”). Under Hawaiian contract law, any ambiguity is construed against the drafter of a contract. *Santiago v. Tanaka*, 2015 Haw. LEXIS 348 (Haw. Dec. 29, 2015). This is true even if his attorney was unaware of basic licensing law. *See e.g., Norman v. Orkin Exterminating Co., Inc.*, 193 F3d 908, 911 (9th Cir. 1999) (“Ignorance of the law, especially by a lawyer, is no defense to noncompliance with the rules of the court in which he appears”).⁹ Because the APA unambiguously states “This Agreement shall be construed to give the Buyer full rights to use the name “Giovanni’s Aloha Shrimp” without any limitation placed upon the Buyer on the use of said name” the APA cannot be construed to be an express trademark license agreement. Nitsche TD1 at Exhibit 8, Appendix A, ¶ 21.C.¹⁰

2. The APA does not contain Elements of a License Agreement

Registrant has failed to proffer sufficient evidence to indicate the agreement between the Petitioner and Registrant operated as a trademark license. Trademark licenses are evidenced by certain elements included in almost every license agreement. For example, license agreements usually contain royalty payments, not a one-time payment such as that described in the APA. *See Parks & Rec. California v. Bazaar Del Mundo*, 448 F.3d 1118, 1130 (9th Cir. 2006). Further, the APA does not contain any license period nor does it describe the return of any intellectual property in the event of breach. *See e.g., Id.* (finding no trademark license when the only payments were rental payments and the termination clause did not provide for surrender of intellectual property). The APA expressly authorizes for joint ownership of the tradename,

⁹ However, Registrant’s attorney was able to draft an “Amendment to the APA” with licensing provisions which belies the “incompetent attorney” argument.

¹⁰ The APA also describes the “joint ownership” of the mark. Nitsche TD1 at Exhibit 8, Appendix A, ¶ 3.C. Registrant’s attorney testified that he advised against the joint ownership of the mark, but that Mr. Nitsche wanted the term. *See Sonson TD at 21:4-8* (“And I do recall...that I did not agree with the joint ownership with John, but I believe that that was the agreed upon term with the buyer, with Mr. Nitsche, that they wanted the term”).

provides for the exclusive right to use the tradename in Hawaii, expressly states the unlimited right to use the tradename and only provides for one limitation related to the *registration* of the tradename outside of Hawaii. See Nitsche TD1 at Exhibit 8.¹¹

3. The Unexecuted Amendment to the APA contains license provisions

On the other hand, Registrant essentially acknowledges that the APA insufficiently described a license arrangement because Registrant commissioned his attorney to draft up an “Amendment to the APA.” Registrant admitted as much in his brief. See e.g., Registrant’s Brief at 26 (“Additionally, the Agreements are ambiguous with respect to whether the terms constitute a license or transfer of ownerships of the Marks, and in either case, which Marks were included in the transaction”). The Unexecuted Document contains plenty of license provisions that, if executed, may constitute an express license. For example, the Unexecuted Document revokes the “joint ownership” clause of the APA and provides a license term limit of 10 years.¹² The Unexecuted Document, while not evidence of an agreement, is evidence of the absence of license terms in the APA. The Unexecuted Document further demonstrates some understanding of the drafting attorney’s knowledge with respect to trademark licensing requirements. To the extent the Unexecuted Document has any probative value; it demonstrates the absence of a license in the APA.

¹¹ Registrant argues the APA limited Petitioner’s use of the mark to Hawaii by referring to the “exclusive rights in the State of Hawaii.” Registrant’s Brief at 25. However, this provision limited the Aragonas’ use of the mark in the State of Hawaii and did not limit Petitioner’s use of the mark at all. “This Agreement shall be construed to give the Buyer full rights to use the name Giovanni’s Aloha Shrimp” without any limitation placed upon the Buyer on the use of said name.” See e.g., Nitsche TD1 at Exhibit 8, Appendix A, ¶ 21. C.

¹² There are also provisions that “Seller” was required to renew the State of Hawaii tradename. Registrant failed to maintain the Hawaii tradename registration.

4. The Unexecuted Document Should not Be Considered Evidence of an Agreement

Registrant does not cite to any case law, Hawaiian or otherwise, to support his position an unexecuted document is proper parol evidence to avoid the conclusion that an unsigned document falls within the statute of frauds, and is not an exception. In fact, under Hawaiian law, “[i]n order that separate writings may be considered together, their relation or connection with each other must appear on their face. The writings must contain either an express reference to each other or the internal evidence of their unity, relation or connection sufficient to make parol evidence of their relation unnecessary.” *Glockner v. Town*, 42 Haw. 485, 487 (1958). In *Glockner*, Defendant signed a check for \$100 and Plaintiff proffered an unsigned receipt that purported to evidence a sale of land running into thousands of dollars by the payee in return for the \$100 check. *Id.* at 489. Because there was “no showing whatever in the document signed by defendant that she ever saw or approved the terms set forth in the receipt or any terms for the sale” the court found there was no contract. *Id.*; see also *Young v. McQuerrey*, 508 P.2d 1051, 1052 (Hawaii 1973) (finding no contract when a “signed memorandum and [an] unsigned deed d[id] not contain express reference to each other, and there [was] nothing in the former which [gave] an appearance that it was signed with reference to the latter”). Thus the signed writing must reference the unsigned writing in order to give any weight to the unsigned writing.

Registrant “connects” the real estate Lease Agreement and the Unexecuted Amendment to the APA. However, there is nothing in the signed Lease Agreement evidencing the Unexecuted Amendment to the APA. The Hawaiian Supreme Court noted in *Glockner*, “[i]f the statute of frauds is to serve to prevent fraudulent claims of contracts, it would be a dangerous proceeding to assume that a check for \$100, standing alone, signed by an individual may be converted into a contract by the payee of such a check for the purchase of lands running into

thousands of dollars by the payee making out an ex parte receipt and inserting therein terms of a contract for the sale of land.” *Glockner*, 42 Haw. at 489. Similarly, the statute of frauds applies in this case. The Unexecuted document drastically limits Petitioner’s rights in the APA and there is no evidence in the Lease Agreement that the Unexecuted Document was signed or even if it was the intent of the parties to sign the document. Further, the APA specifically recites that any changes to the terms of the APA must be acknowledged in writing and signed by both parties. See Nitsche TD1 at Exhibit 8, Appendix A ¶ 21.A. (“Any modification of this Agreement must be in writing and executed by both of the parties hereto”). The Unexecuted Document should not be given any factual weight.

C. Licensee Estoppel, Equitable Estoppel and Contractual Estoppel

Registrant has failed to establish a license agreement and has also failed to establish ownership in any mark and thus this argument is pure supposition. However, Petitioner notes for the Board that the citations utilized by Registrant all appear to refer to estoppel of a licensor’s challenge to the validity of a mark “during the term of the license.” See Registrant’s Brief at 26-27. Registrant has not proffered any evidence as to the alleged “license” term. This further evidences the lack of any “license” agreement.

Registrant also has not sufficiently made out a claim for equitable estoppel and Petitioner requests this argument be stricken. See Registrant’s Brief at 27-28. Registrant merely sets out the elements of equitable estoppel and then fails to provide any arguments.

Finally, Registrant argues that the APA contractually estops Petitioner from challenging the registration of his marks. Registrant’s Brief at 28. However, Registrant fails to indicate which provision of the APA precludes a *challenge to registration* of a mark. Instead Registrant only makes the recycled argument that *Registrant’s* own limitation against use in Hawaii and Troy

Nitsche's agreement not to register "Giovanni's Aloha Shrimp" outside of Hawaii is sufficient to "contractually estop" a challenge to *Registrant's registration*.¹³ There is no such provision in the APA. Even Registrant's own case law supports Petitioner. See Registrant's Brief at 28 citing to *Danskin, Inc. v. Dan River, Inc.*, 498 F.2d 1386, 182 USPQ 370, 372 (CCPA). In *Danskin*, the settlement agreement specifically stated Danskin, Appellant, "will not oppose or petition to cancel directly or indirectly any registration by Dan River for a 'Dan' mark." *Danskin*, 498 F.2d at 1387. Similarly, Dan River, Appellee, had agreed not to use the marks DANSKIN, DANSHEEN or DANSOFT. *Id.* Adhering to the express contract language and since the applied-for mark was not one of the three listed marks, albeit a similar "DAN" mark, the CCPA found Appellant was bound by its contractual agreement not to oppose "DAN" marks other than those listed. *Id.* at 1388-89. As is clear from *Danskin*, contractual estoppel only applies to the subject matter of express contract provisions. The only purported "trademark" listed in the APA is the *tradename* "Giovanni's Aloha Shrimp" and there was no contractual provision restricting Petitioner's predecessor from challenging the registration of Registrant's mark.¹⁴

D. Petitioner's Reply to Registrant's Arguments regarding Likelihood of Confusion, False Suggestion of a Connection, Abandonment, Misrepresentation, and Fraud

Registrant fails to proffer any meaningful response to Petitioner's Trial Brief and Petitioner maintains its arguments in Petitioner's Trial Brief. Registrant's Brief does request that

¹³ Registrant's contract attorney even testified that the original draft contained much stricter limitations, but the final draft only contained the registration clause. See Sonson TD at 20:7-21:2 ("We discussed this as a limitation, and it started out to be a lot more restrictive, actually, than this...and [Registrant] wanted...to do business in other islands, just in case. But it ended up like, okay, we'll just limit it to Hawaii and just make sure that [Registrant] can do whatever he wants with his business out of Hawaii...").

¹⁴ Registration restrictions are usually entered into in order to settle infringement suits. See MCCARTHY § 18:82. There is no support for this type of contractual provision in a case where a purchaser buys the privilege to jointly own a mark and the other purported owner abandons the mark.

the Board strike certain “actual confusion” evidence in an attempt to distract from the real issues in the case.¹⁵ Registrant does not address any other likelihood of confusion factor. Evidence of actual confusion is unnecessary to prove a likelihood of confusion and there is plenty of evidence of a likelihood of confusion. See MCCARTHY § 23:12; Petitioner’s Trial Brief at 16-17. Even if the Board does strike the two emails, Petitioner introduced evidence of numerous other instances of actual confusion in other emails supplied by Registrant. See Petitioner’s Trial Brief at 16-17 and citations to PNOR Exhibit 6 therein.

Registrant also does not provide any support for the contorted position that a foreign language equivalent of a first name magically entitles a single, specific individual to exclusive ownership over the foreign language equivalent, *ipso facto* entitling Registrant to judgment. See Registrant’s Brief at 35. Registrant also, for the first time challenges the sufficiency of the abandonment claim in the Petition. However, the time for challenging the sufficiency of the Petition has long since passed and this argument should be flatly rejected as untimely.

E. Registrant’s Objection to the Void Ab Initio Argument

Registrant improperly objects to Petitioner’s Void Ab Initio argument and does not properly address this issue in the main portion of the brief. The original Petition states at ¶ 26, “Registrant has never used the mark GIOVANNI’S ORIGINAL WHITE SHRIMP TRUCK in connection with mobile restaurant services.” This is sufficient to put Registrant on notice of Petitioner’s

¹⁵ It is unclear exactly what Registrant is asserting, but to the best of Petitioner’s knowledge, Registrant is arguing that evidence Registrant sent to Petitioner in order to assert actual confusion, is now somehow controverted evidence. Nitsche TD1 at 55:15-58:2 and Exhibit 10 (Registrant’s counsel sent certain emails to Petitioner asserting confusion). Further, Petitioner’s counsel takes exception to Registrant Counsel’s assertion that Petitioner’s counsel was aware of false evidence or testimony. There is no evidence of this and quite frankly, if Registrant’s counsel believed the emails were somehow misrepresentative, she should have raised this issue well before the filing of her brief. It was clear from Mr. Nitsche’s testimony he was unaware of the issue and Petitioner’s counsel remains unaware of any issue about the authenticity of the emails **originally produced and asserted by Registrant’s counsel.**

claim. Further, both parties took testimony on this issue. See e.g., Nitsche TD1 at 54:12-55:4; Sonson TD at 24:4-25:14; Aragon TD 7:5-6. Petitioner's Trial Brief addressed this issue. Petitioner's Trial Brief at 25-27. The Void ab Initio argument should be considered.¹⁶

IV. CONCLUSION

For the reasons addressed in Petitioner's Trial Brief, Petitioner requests the Board cancel the Marks at Issue.

Respectfully submitted,
LuckyU Enterprises, Inc. dba Giovanni's Original
White Shrimp Truck

Date: January 15, 2016

/s/Daniel Mullarkey/
Daniel Mullarkey
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¹⁶ The GIOVANNI'S ORIGINAL WHITE SHRIMP TRUCK trademark also should be canceled for all of the other reasons enumerated in Petitioner's Trial Brief. See Petitioner's Trial Brief at footnote 9.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2016 a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was served on Registrant's Counsel, Jamie N. Pitts., The Law Office of Jamie N. Pitts, Esq., 887 W. Marietta Street, NW, Ste. M-105, Atlanta, GA 30318, via First Class Mail, with a courtesy copy served via e-mail to jamienpitts@jnplawfirm.com.

s/Daniel Mullarkey/

Daniel Mullarkey

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Trial and Appeal Board

Cancellation No. 92057023

Registration Nos: 4,220,686 - GIOVANNI'S ALOHA FOODS
 4,224,400 - GIOVANNI'S SCAMPI MARINADE
 4,232,469 - GIOVANNI'S ORIGINAL WHITE SHRIMP TRUCK
 4,248,595 - GIOVANNI'S HOT & SPICY WE REALLY MEAN IT! SAUCE

LuckyU Enterprises, Inc.)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92057023
)	
John Aragona)	
)	
Registrant)	

**PETITIONER'S APPENDIX WITH OBJECTIONS
TO RESPONDENT'S EVIDENCE**

**1. Registrant's Testimony Evidence Is The Product of Leading Or Other
Objectionable Questions and Should Not Be Considered**

Most of the testimony relied upon in the Response is inadmissible because Registrant's counsel's testimony deposition questions of her witnesses were improper. Petitioner timely objected to the improper questions at the testimony deposition to allow counsel the opportunity to reform appropriate questions at that time. Registrant has provided no appropriate explanation of such testimony. Further, the manner in which Registrant cited to testimony is improper. Registrant requests the following testimony be stricken or given little probative weight by the Board:

Brief Page	Citation	Objection
8	43 TTABVue at 6	Leading
8	25 TTABVue at 89-90	Beyond Scope of Examination/Form
8	46 TTABVue at 73-74	Leading/foundation/calls for a legal conclusion
8	44 TABVue at 43	Leading
8	46 TTABVue at 433-434	Foundation
9	44 TTABVue 248	Foundation
9	Aragona DD at 25-30	Trademark Rule 2.120(j)(2)
9	Aragona DD at 30	Trademark Rule 2.120(j)(2)
9	Aragona DD at 26	Trademark Rule 2.120(j)(2)
9	Aragona DD at 27	Trademark Rule 2.120(j)(2)
9	33 TTABVue 253, 254, 256, 257	Foundation
10	43 TTABVue 6, 23-25; 37-40, 42	Leading
10	46 TTABVue at 73	Leading/Foundation
10	46 TTABVue at 90	Beyond Scope of Examination/Form
10	43 TTABVue at 25-26, 37-40	Leading/Foundation/Form/Narrative
10	Aragona DD at 35, 52, 57	Trademark Rule 2.120(j)(2)
10	44 TTABVue 8, 15-16, Exh. 6	Form/Leading/Foundation
10	43 TTABVue 6	Leading
10	25 TTABVue at 89-90	Beyond Scope of Examination/Form
10	46 TTABVue at 73-74	Leading/foundation/calls for a legal conclusion
10	44 TTABVue at 43	Leading
10	43 TTABVue at 23, 40-41	Form/Leading
10	Aragona DD at 32, 73, 139	Trademark Rule 2.120(j)(2)
10	44 TTABVue 194-198	Foundation
10	43 TTABVue at 7-9, 12	Foundation/Narrative/Leading
10	43 TTABVue at 12	Form/Leading
10	44 TTABVue 10	Leading/Foundation
10	43 TTABVue at 22	Foundation/Leading
11	43 TTABVue at 50	Leading/Foundation
11	44 TTABVue 10	Leading/Foundation
11	43 TTABVue 9-10	Form/Narrative
11	39 TTABVue 24	Foundation
11	44 TTABVue 60	Form/Leading/Foundation
11	43 TTABVue 9-13, 15-16, 21-22	Form/Narrative/leading
13	1 TTABVue 18	Foundation
14	46 TTABVue 159	Foundation
14	46 TTABVue 12-15	Foundation/Calls for Legal

		Conclusion
14	46 TTABVue 164	Foundation
15	43 TTABVue 90-91	Foundation/Hearsay
15	46 TTABVue 12	Leading/Form
15	46 TTABVue 121	Foundation
15	46 TTABVue 156	Foundation
15	46 TTABVue 11-12	Form/Foundation/Calls for a Legal Conclusion
15	43 TTABVue 26-28	Leading/Narrative
16	44 TTABVue 240	Foundation
16	25 TTABVue 209	Foundation
21-23	46 TTABVue 69-76	Calls for Legal Conclusion/Leading/Foundation/
29	Aragona DD at 25-30	Trademark Rule 2.120(j)(2)
29	1 TTABVue 18; 29	Foundation
29	43 TTABVue 42	Foundation
29	Aragona DD at 27	Trademark Rule 2.120(j)(2)
29	43 TTABVue at 25-26, 37-40	Form/Leading/Narrative/Foundation
29	Aragona DD at 35, 52, 57	Trademark Rule 2.120(j)(2)
29	44 TTABVue 15-16	Foundation/Leading
29	43 TTABVue 23	Foundation
29	Aragona DD at 32, 73, 139	Trademark Rule 2.120(j)(2)
29	44 TTABVue 194-198	Foundation
29	44 TTABVue 248	Foundation
29	46 TTABVue at 19-20	Form/Foundation/leading
29	43 TTABVue at 12	Foundation
29	Aragona DD at 74	Trademark Rule 2.120(j)(2)
30	Aragona DD at 34-35	Trademark Rule 2.120(j)(2)
34	25 TTABVue at 66	Foundation

As required by the rules, Petitioner timely objected to the leading and impermissible testimony during the testimony depositions, giving Registrant's counsel an opportunity to reform her questions. Petitioner also advised at the taking of testimony it would object to any defective testimony proffered by Registrant and Registrant failed to address these objections at all during its deposition or in its Response. For these reasons, Petitioner respectfully request the Board strike the relevant testimony and/or afford it little evidentiary weight. *Standard Knitting, Ltd. V. Toyota Jidosha Kabushiki Kaisha*, 77 USPQ.2d 1917, 1922 (Fed. Cir. 2006) (giving testimony elicited by leading questions little probative weight).

II. Registrant Improperly Relies Upon Discovery Deposition Testimony

In Accordance with Trademark Rule 2.120(j)(2), discovery deposition testimony may only be offered by an adverse party. Registrant cites to his own discovery deposition in numerous instances, addressed above. Registrant has not indicated why these citations should “be considered so as to make not misleading what was offered by the submitting party” as is required by the Trademark Rules. The citations to Registrant’s discovery deposition, as offered by Registrant, should not be considered or given little probative weight. .

III. The Unexecuted Document is Hearsay

Registrant’s exhibit at 43 TTABVue 90-91, the purported Amendment to the APA, should be stricken as impermissible hearsay to the extent Registrant relies on the document for the truth of the matter asserted.